72-285

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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1972

No. 72-285

G. DOUGLAS & MARY TIBBITTS, Bankrupts,

Petitioners,

V.

JAMES E. CUSSEN, Trustee, *Respondent.*

PETITION FOR A WRIT OF CERTIOARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIOARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, G. DOUGLAS and MARY TIBBITTS, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 12, 1972.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The Order of the District Court for the Eastern District of California, which is unreported, is printed in the Appendix, as is the original order of the Referee in Bankruptcy, likewise unreported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 12, 1972. A timely petition for rehearing was denied on May 23, 1972, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., s1254(1).

QUESTIONS PRESENTED

1. Whether oral announcement of successive continuances, extending over six months and through eight continued hearings, of a dismissal or adjudication hearing upon an unconfirmed Chapter XI arrangement, constitutes sufficient notice to satisfy Due Process.

2. Whether oral announcement of successive continuances, extending over six months and through eight continued hearings, of a dismissal or adjudication hearing upon an unconfirmed Chapter XI arrangement constitutes compliance with 11 U.S.C., s776(2).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 11:

s776(2) [s376(2) of the Bankruptcy Act]:

" . . . Where the petition was filed under Section 322 of this Act, enter an order, upon hearing after notice to the

debtor, the creditors and such other persons as the court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act or dismissing the proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors: *Provided, however*, that an order adjudging the debtor a bankrupt may be entered without such hearing upon the debtor's consent."

STATEMENT OF THE CASE

On May 2, 1968, petitioners invoked the jurisdiction of the federal courts by the filing of an original, voluntary petition under Chapter XI of the Bankruptcy Act (Section 322, 11 U.S.C., s772). The assets involved were substantial, and valued between $300,000 and $600,000; the liabilities were also substantial, including a single secured creditor which held a security interest in almost every asset, with an obligation of approximately $200,000, and unsecured claims in the approximate amount of $175,000.

Petitioners filed a proposed plan of arrangement on July 17, 1968, and the creditors hearing for approval was held September 17, 1968. The unsecured creditors, in the words of the bankruptcy referee, "overwhelmingly accepted the plan," filing 44 acceptances of 58 unsecured claims, or a dollar amount of $119,191 for approval of $168,897 in dollar value of unsecured claims. In opposition to this, the single secured creditor, Bank of Sacramento, now Security Pacific National Bank, vigorously objected to confirmation.

Written notice was sent to all creditors of a hearing to be held on July 25, 1968, on the question of dismissal or adjudication in the event the plan was not confirmed. This hearing was dropped and a new written notice was mailed on July 26, 1968, advising of an adjourned meeting under s376(2) to be held on October 8, 1968.

Pending at the time of the September 17, 1968, meeting wherein the plan was approved by the creditors, were six separate matters: (1) Whether an indemnity bond should be required of the debtors, (2) The election of a creditors

committee, (3) Hearing on application for confirmation, (4) Whether to adjudicate or dismiss if confirmation were refused, (5) Petition of Bank of Sacramento to foreclose various security interests, and (6) Petition by debtors to set aside a certain pledge sale previously made by Bank of Sacramento. These same matters were all before the referee at the October 8, 1968, hearing, which was the time which had been noticed to all creditors by mail for the dismissal or adjudication hearing.

At this point, all six of the pending matters, including the s376(2) hearing, were continued, not because of delays caused by the debtors, through the following hearing dates: 10/17/68, 10/29/68, 11/26/68, 1/7/69, 2/7/69, 3 /4/69, 3/15/ /69, and 4/23/69. On each of these dates the continuance of all these matters was orally announced by the referee, including the continuation of the s376(2) hearing. However, no additional written notice was sent to creditors concerning the hearing on adjudication or dismissal, other than that sent on July 26, 1968, in respect to the hearing to be held October 8, 1968. Abruptly and with no hint or warning that it was coming, the referee, on April 23, 1969, refused to confirm the plan of arrangement and then, equally abruptly, announced: "Well, the court is going to proceed today on the hearing as to whether there should be an adjudication or dismissal."

Since so many matters had been routinely continued, hearing after hearing, it would be unrealistic to conclude that the creditors had actual notice that this particular hearing, April 23, 1969, after eight continuances, would be the one at which adjudication or dismissal would actually be considered. Because of the antagonism between the interests of unsecured creditors and the single secured creditor, there was every reel need for actual notices of hearings on the important questions of confirmation and adjudication or dismissal. The secured party, Bank of Sacramento, was represented by counsel at every continued hearing including that of adjudication. The record does not indicate the presence of any unsecured creditor on April 23, 1969, and it is submitted that this is because they had constitutionally insufficient notice. The debtors likewise had no indication

that this hearing would finally be *the* hearing at which these important matters would be decided. They were equally surprised and unable to resist the referee's determination not to confirm the plan. The business manager of the two debtors was violently ill and unable to attend the hearing; the referee refused a continuance.

On April 23, 1969, the referee adjudicated the petitioners bankrupt and writ of review to the District Court was had which resulted in an affirmation of the referee's order. Thereafter, the bankrupts, petitioners herein, appealed to the United States Court of Appeals for the Ninth Circuit which affirmed the District Court.

REASONS FOR GRANTING THE WRIT

1. LACK OF NOTICE

Constitutional due process limitations upon the practice of frequent continuances, orally announced by courts, extending over a considerable period of time, presents an important question of federal law and a common practice of the lower courts which should be settled by this Court. The importance of notice to due process has been repeatedly pointed out by this Court, as in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-314 (1950):

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.
>
> * * * * *
>
> " 'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean*, 234 U.S. 385 . . . this right to be heard has little reality or worth unless one is informed that the matter is pending and one can choose for himself whether to appear or default, acquiesce or contest."

Petitioners contend that a new notice, in writing, to debtors and creditors that, after eight continuances, this, the hearing of April 23, 1969, would be the one wherein confirmation and adjudication would be considered, would be the only constitutionally sufficient notice. The failure to give renewed written notice, after such extended continuances, undoubtedly left both the creditors and debtors with no actual notice of the April 23, 1969, hearing and certainly no notice that this would be *the* hearing.

> " . . . (W)ithin the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Mullane v. Central Hanover National Bank & Trust Co.*, 339 U.S. 306, 318 (1950).

The failure to give renewed written notice of the s376(2) hearing is also in violation of the statute, 11 U.S.C., s776(2). Petitioners have found only one case dealing precisely with the question of Section 376(2) notice of adjourned meeting. That is *In re Barron's Fur Co., Inc.*, (S.D.N.Y., No. 81, 965; May, 1943), as reported and summarized in CCH Bankruptcy Law Reporter, s54,339:

> "The notice required by Section 376 of the hearing which resulted in an adjudication in bankruptcy was given in the original notice of the hearing on the confirmation of the plan of arrangement wherein it was stated that the same hearing would be held for the purpose of determining whether the debtor should be adjudicated a bankrupt; *although the hearing was adjourned from time to time, the debtor and the creditors had notices of all the adjournments.* [Summary of opinion of Clancy, D.J.]" (Emphasis supplied).

Renewed notice of adjourned meetings is not a strange thing. For example Rule 53(d) of the Federal Rules of Civil Procedure require a master to give notice to absent parties of an adjourned meeting. Section 365 of the Bankruptcy Act, 11 U.S.C. 765, requires at least ten days

notice of an adjourned or reopened meeting if an alteration or modification is proposed in a Chapter XI plan before confirmation. If a renewed notice is required to be given creditors for a modification, can it be thought that an actual rejection of the plan and adjudication of the debtors as bankrupts has less of an effect and therefore renewed notice is not required?

The last notice which did advise of the Section 376(2) hearing, dated July 26, 1968, was *itself* a notice of an *adjourned* meeting, the original s376(2) hearing having been calendared for July 25, 1968, and dropped. Thus no impracticability appears why new notices could not have been sent in early April advising that the latest continued hearing would be *the* hearing at which confirmation, dismissal or adjudication would be considered.

It is not enough to say that the creditors, once having received notice, could have followed or inquired about the continuances. In the first place neither the debtors nor the creditors could have anticipated that this *finally* was to be the hearing on confirmation or adjudication. Secondly the creditors should not be required to inquire or follow the adjournments. Analogous to this proposition is *City of New York v. New York, New Haven & Hartford R. R. Co.*, 344 U.S. 293 (1953). There, the city asserted a lien for taxes on certain specific realty, but was not notified by mail of order directing the filing of claims. The order was published. The city did not file its claim and the railroad contended the city's claims were forfeited. This Court denied this contention, holding (344 U.S. at 297):

> "Nor can the bar order against New York be sustained because of the city's knowledge that reorganization of the railroad was taking place in the court. The argument is that such knowledge puts a duty on creditors to inquire for themselves about possible court orders limiting the time for filing claims. But even creditors who have knowledge of a reorganization have a right to assume that the statutory, reasonable notice, will be given them before their claims are forever barred. When the judge ordered notice by mail to be given the appearing creditors, New York City acted reasonably in waiting to receive the same treatment.

"The statutory command for notice embodies a basic principle of justice — that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights. New York City has not been accorded that kind of notice."

Nor have the debtors or unsecured creditors herein been accorded that kind of notice. The antagonism of interest between the secured creditor and the unsecured creditors, and the overwhelming acceptance of the debtors' plan of arrangement, both strongly suggest that had notice been given of the April 23, 1969, hearing, the unsecured creditors might well have appeared to strenuously urge confirmation of the plan. Had such notice been given, the debtors themselves would have been prepared to go forward at the hearing.

2. STANDING OF PETITIONERS

Although petitioners-debtors assert a right to notice, and a lack thereof, in themselves, they also assert their rights in respect to their unsecured creditors. They have standing to do this for several reasons. First, the unsecured creditors were overwhelmingly in support of petitioners' plan of arrangement and, therefore, in a position of antagonism with the opposing secured creditor. Certain of the unsecured creditors attempted to file amicus curiae briefs in the Ninth Circuit proceedings on behalf of Petitioners. Further, the very language of Section 376(2) itself, 11 U.S.C., s776(2), "*Provided, however,* that an order adjudging the debtor a bankrupt may be entered without such hearing upon the debtor's consent," evidences a Congressional recognition that the purpose of the dismissal or adjudication hearing and with it the requirement of notice to the creditors, is, in part, for the benefit of the debtors. Were the Section 376(2) hearing not for the debtors benefit there would be little point in giving the debtors the power to dispense with it by their consent. Therefore, the propriety and regularity of the meeting insofar as regards both the debtors and the creditors can be properly raised by the debtors since it is for their benefit as well as the creditors'. The facts in this case warrant this position, inasmuch as the unsecured cred-

itors strongly supported the petitioners-debtors in opposition to their secured creditor.

It must be conceded that although the issue of Section 376(2) notice was squarely presented to the Ninth Circuit, it was not raised before the District Court by different counsel who then represented petitioners. However, it is the teaching of this Court that:

> "Rules of practice and procedure are devised to promote the ends of justice, not defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

A major criterion whether a court will consider error not raised below is whether the alleged error was overlooked by counsel earlier through inadvertence rather than by deliberate design. "Of course, where it is in the interests of justice, we will consider a point on appeal even though counsel through negligence or inadvertence has failed below to claim his client's strongest point," *United States v. Vater*, 259 F. 2d 667, 672 (2nd Cir., 1958). See also *Pritchard v. Liggett & Myers Tobacco Company*, 350 F. 2d 479, 486 (3rd Cir., 1965); *Shimabukuro v. Nagayama*, 140 F.2d 13, 15 (D.C Cir., 1944). The lack of deliberate design in failing to raise this point below is shown by respondent's concession in briefs before the Ninth Circuit that oral notice of continuances, even of adjudication hearings, is standard practice in Sacramento, California. Since this is standard procedure it is obvious why the point was not raised by petitioners' former attorney, a Sacramento lawyer, before a Referee and District Court sitting in Sacramento. This Court has defined the category of error which should be reviewed by appellate courts, although not raised below on numerous occasions: *Silber v. United States*, 370 U.S. 717, 718 (1962); *Johnson v. United States*, 318 U.S. 189, 200 (1943); *United States v. Atkinson*, 297 U.S. 157, 160 (1936):

"In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, *or*, if they otherwise *seriously affect the fairness, integrity, or public reputation of judicial proceedings.*" (Emphasis supplied).

Although the instant case should not perhaps be held to the same strict standard, since the error is urged upon the court and need not be noticed on its own motion, appellants contend they can meet the alternative and emphasized portion of the test. First, it should be noted that review of error not raised below is most often applied in criminal cases but also applicable to civil matters, eg., *Pritchard v. Liggett & Myers Tobacco Company* and *Shimabukuro v. Nagayama, supra*, and *Mazer v. Lipschutz*, 322 F2d 42, 52 (3rd Cir., 1964). Next, it is clear that the "exceptional cases or particular circumstances" warranting review (*Hormel v. Helvering, supra*, 312 U.S. at 557), can refer to the failure to follow "certain specific procedural directions," *Ward v. Anderson*, 208 F.2d 48, 50 (D.C. Cir., 1953).

The reason why the lack of written notice to the creditors of the hearing on adjudication affected fundamental fairness and the public reputation of that proceeding is because the unsecured creditors overwhelmingly approved the debtors' plan and their interests were sharply opposed to those of the Bank of Sacramento. They have consistently supported the appellants and their Chapter XI plan as shown by their acceptance of the plan, the declarations of support sought to be introduced before the District Court and most recently by their attempt to file an Amicus Curiae Brief in the Ninth Circuit.

Because the unsecured creditors had and have shown such an interest in the proceedings, and because their interests were and are so sharply opposed to those of the bank, fundamental fairness dictates that they should have received written notice that after eight oral continuances, April 23, 1969, would be *the* hearing at which adjudication or dismissal would actually be considered. The bank was represented by counsel at every hearing, including that for adjudication;

the unsecured creditors were not even notified that there would be such a hearing. There can be no question but that the violation of Section 376(2) herein was fundamentally unfair, affected the public reputation of the proceedings insofar as these creditors were concerned, and was a prejudicial denial of due process to petitioners.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

August 11, 1972.

Respectfully submitted,

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APPENDIX

Filed
Apr 12 1972

United States Court of Appeals
For the Ninth Circuit

In the Matter of:

G. DOUGLAS and MARY TIBBITTS,

Bankrupt,

Appellants,

vs.

JAMES E. CUSSEN, Trustee, et al.,

Appellees.

No. 25,814

On Appeal from the United States District Court for the Eastern District of California

Before: CHAMBERS and TRASK, Circuit Judges, and MURRAY, District Judge.

Per curiam:

On this appeal from two bankruptcy orders, we affirm.

We conclude that the finding of unfeasibility of an arrangement plan was not clearly erroneous.

The objection as to adequate notice to the bankrupts and creditors was not raised below. It is not a case of no notice. Thus, we do not think it presents here a naked question of power to act.

Filed
Sep 11 1969

In the United States District Court
For the Eastern District of California

In the Matter of

G. DOUGLAS TIBBITTS
and MARY TIBBITTS,

Bankrupts

No. BK-S 6610-P

ORDER DENYING
PETITION FOR REVIEW
AND AFFIRMING
REFEREE'S ORDER

This matter came on regularly for hearing on June 17, 1969, before the Honorable THOMAS J. MacBRIDE, judge presiding; LOREN S. DAHL of DAHL, HEFNER, STARK & MAROIS, appearing for the bankrupts, G. DOUGLAS TIBBITTS and MARY TIBBITTS; THOMAS W. OLSON, JR. appearing for JAMES E. CUSSEN, Trustee in Bankruptcy of the estates of said bankrupts, and JOSEPH S. GENSHLEA of DOWNEY, BRAND, SEYMOUR & ROHWER appearing for BANK OF SACRAMENTO, a secured creditor; and the petition for review of the order of BRYTE M. PETERSON, Referee in Bankruptcy, dated April 23, 1969, together with the record of the proceedings before the Referee, and the proof of the parties introduced at the hearing before this court having been fully considered and argued, the court hereby adopts and finds as true each and all of the findings of fact and conclusions of law of the Referee and concurrently finds as follows:

FINDINGS OF FACT

1. The capital structure of the bankrupts' public relations and newspaper business was, and is, inadequate. The assets of such business consisted mainly of encumbered equipment (a printing press) and accounts receivable of doubtful value which were subject to a security agreement.

2. No income is derived for the benefit of the unsecured creditors from the bankrupts' real property, and the value of such real property does not exceed the liabilities against it arising from deeds of trust.

3. The bankrupts' investment in Davis Enterprise, Inc. stock, of unknown value, cannot be liquidated to finance the plan without protracted litigation.

4. The bankrupts' only source of income is from their public relations and newspaper business. This is insufficient to meet operating expenses and the deferred payments to be made creditors pursuant to the terms of the proposed arrangement.

5. There are no prospects for the rehabilitation of the bankrupts' business.

From the foregoing facts, the court concludes:

CONCLUSIONS OF LAW

That the arrangement proposed is not feasible and the debtors should be adjudicated bankrupts.

ORDER

IT IS, THEREFORE, ORDERED that the petition of the bankrupts for review of the order of the Referee refusing confirmation and adjudicating the debtors bankrupts, dated and filed April 23, 1969, is hereby denied and the order of the Referee is hereby affirmed.

DATED: SEPT. 11, 1969.

THOMAS J. MacBRIDE
United States District Judge

Filed
Apr 23 1969

In the District Court of the United States
in and for the Eastern District of California

In the Matter of

G. DOUGLAS TIBBITTS AND MARY TIBBITTS (Valley Newspaper Advertising and Public Relations and Tibbitts Publications),

Debtors

IN PROCEEDINGS FOR ARRANGEMENT UNDER CHAPTER XI OF THE BANKRUPTCY ACT

No. BK-S-6610-P

ORDER REFUSING CONFIRMATION AND DISMISSING PROCEEDINGS, ADJUDICATING DEBTORS BANKRUPTS, AND DIRECTING THAT BANKRUPTCY BE PROCEEDED WITH

At Sacramento, in said District, on April 23, 1969.

The application of G. DOUGLAS TIBBITTS and MARY TIBBITTS, the above named debtors, for confirmation of the arrangement under Chapter XI of the Bankruptcy Act, proposed by said debtors in the petition filed by them on May 2, 1968, having been heard and duly considered; and due notice of said hearing having been given by mail to all persons entitled thereto; and the Court not being satisfied that the arrangement is for the best interest of the creditors or is feasible; the Court being further satisfied that the debtors are guilty of acts and have failed to perform duties

which would be a bar to their respective discharge as a bankrupt; and, the Court further being satisfied that the debtors have no prospects for rehabilitation;

NOW upon all the proceedings had before me and due deliberation having been had thereon; it is

ORDERED that confirmation of said arrangement be, and it hereby is, refused; and it is further

ORDERED that the proceedings commenced by the filing hereon on May 2, 1968, of the debtors' petition under Section 322 of said Act proposing an arrangement under Chapter XI of said Act be, and it hereby is, dismissed; and it is further

ORDERED that the debtors be, and each of them are, hereby adjudicated bankrupts, and that bankruptcy be proceeded against them, and each of them, pursuant to the provisions of said Act.

BRYTE M. PETERSON
Referee in Bankruptcy